

Message Text

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PAGE 01 BONN 09431 01 OF 04 231736Z
ACTION SS-25

INFO OCT-01 ISO-00 SSO-00 /026 W
-----090241 231742Z /42

P R 231714Z MAY 78
FM AMEMBASSY BONN
TO SECSTATE WASHDC PRIORITY 8786
INFO AMEMBASSY BRUSSELS
AMEMBASSY LONDON
AMEMBASSY THE HAGUE
SECDEF WASHDC
USCINCEUR VAIHINGEN GE

S E C R E T SECTION 01 OF 04 BONN 09431

EXDIS

MILITARY ADDRESSEES HANDLE AS SPECAT EXCLUSIVE

SECDEF FOR OASD/ISA/PP AND NSCA; OJCS CINCEUR FOR
ECJ4/7-N FOR COLONEL SCHMIDT

E.O. 11652: XGDS 3
TAGS: MNUC, MARR, GW, NL, BE, UK, US
SUBJECT: MEMORANDA OF UNDERSTANDING ON NUCLEAR
WEAPONS RECOVERY

REFS: (A) STATE 125812 DTG 172127Z MAY 78
(B) BONN 8804 DTG 121358Z MAY 78

SUMMARY: US, UK, BELGIAN AND NETHERLANDS EMBASSIES
AND FRG FOREIGN OFFICE HAVE REACHED AD REF AGREEMENT
ON SUBJECT MOU'S. LONG DISCUSSION OF CIVIL LIABILITY PART
OF SECTION IV FINALLY RESULTED IN COMPROMISE TEXT
THAT SHOULD BE ACCEPTABLE TO ALL GOVERNMENTS, ALTHOUGH
SCOPE OF REBUTTABLE PRESUMPTION MAY BE DIFFERENTLY

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UNDERSTOOD, IN PARTICULAR BY BELGIANS. END SUMMARY

1. AT FIVE-WAY MEETING MAY 19, AFTER BRIEF REVIEW OF
WHERE WE HAVE BEEN, THERE WAS DISCUSSION OF INTENTION
TO NAME DOCUMENTS MEMORANDA OF UNDERSTANDING (GERMAN:
VEREINBARUNG). FRG REP (RUMPF) STATED THAT CHARACTERI-
ZATION OF DOCUMENT WAS NOT DECISIVE AS WAS ITS

SUBSTANCE AND WOULD NOT AFFECT RATIFICATION REQUIREMENTS IN FRG. UK REP (EATON) STATED THAT IN UK PRACTICE "MEMORANDUM OF UNDERSTANDING" WAS A TERM DEVELOPED TO TAKE INTERNATIONAL AGREEMENTS THAT ARE CLASSIFIED OUT FROM REQUIREMENT OF ARTICLE 102 OF UN CHARTER THAT THEY BE REGISTERED WITH UN SECRETARIAT. RUMPF AGREED TO PUT TERM "MEMORANDUM OF UNDERSTANDING" IN PARENTHESIS AFTER GERMAN TERM VEREINBARUNG IN GERMAN TEXT.

2. NETHERLANDS REP (DEMING) STATED THAT AT LEAST THE TRILATERAL MOU WITH THE NETHERLANDS SHOULD STATE THAT IT IS BETWEEN MINISTERS AND NOT BETWEEN GOVERNMENTS AS LATTER WOULD IMPOSE REQUIREMENT THAT MOU BE SUBMITTED TO NETHERLANDS PARLIAMENT. CONSEQUENTIAL CHANGES WOULD THUS BE REQUIRED IN MOU WITH THE NETHERLANDS TO CHANGE TERM "GOVERNMENTS" WHERE USED TO "APPROPRIATE AUTHORITIES."

3. PRESENCE FOR FIRST TIME OF REPRESENTATIVE OF FRG FINANCE MINISTRY (FMF) LED TO RATHER FULL REVIEW OF PURPOSE OF MOU'S AND BACKGROUND OF CIVIL LIABILITY QUESTION. US REP (PFUND) DESCRIBED PURPOSE OF SPLIT OF SECTION IV INTO FOUR SUB-SECTIONS TO DEAL WITH FOUR DIFFERENT ASPECTS, AND HE REVIEWED PURPOSE OF REFERENCE TO ARTICLE VIII (5)(E)(II) OF NATO SOFA TO
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CREATE REBUTTABLE PRESUMPTION THAT THERE BE A THREE-WAY SPLIT OF DAMAGES RATHER THAN 75:25 SPLIT BETWEEN THIRD STATE AND FRG, RESPECTIVELY. NO REPS HAD ANY DIFFICULTY WITH SPLIT OF SECTION IV INTO FOUR SUB-SECTIONS.

3. BELGIAN EMBASSY MINISTER (CASSIERS) STATED THAT LANGUAGE OF SUB-SECTION IV DEALING WITH CIVIL LIABILITY (TEXT AS CONTAINED STATE 104528) WOULD HAVE RESPONSIBILITY FOR DAMAGE BE FOR DAMAGE ARISING OUT OF (A) LOSS, (B) UNAUTHORIZED REMOVAL, AND (C) EFFORTS TO RECOVER NUCLEAR WEAPON. CASSIERS ARGUED THAT MOU'S WERE NOT REALLY INTENDED TO DEAL WITH A AND B BUT RATHER EFFORTS TO RECOVER LOST NUCLEAR WEAPON IN "HOT PURSUIT" AND DAMAGES ARISING FROM THOSE RECOVERY EFFORTS. HE THEREFORE PROPOSED THAT REFERENCES TO A AND B BE DELETED. CASSIERS ALSO QUESTIONED NEED FOR TERMS "IN PARTICULAR" AND REBUTTABLE PRESUMPTION WHICH THOSE WORDS CREAT WHICH WOULD ONLY GENERATE ARGUMENTS BETWEEN LAWYERS IN THE EVENT OF AN INCIDENT. HE STATED THAT ON INSTRUCTIONS HE WAS PROPOSING DELETION OF "IN PARTICULAR" AND SUGGESTING THAT RESPONSIBILITY FOR DAMAGE ARISING

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P R 231714Z MAY 78
FM AMEMBASSY BONN
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AMEMBASSY LONDON
AMEMBASSY THE HAGUE
SECDEF WASHDC
USCINCEUR VAIHINGEN GE

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EXDIS

MILITARY ADDRESSEESHANDLE AS SPECAT EXCLUSIVE

OUT OF ACTION UNDERTAKEN IN FURTHERANCE OF PARAGRAPH 1
OF SECTION IV BE APPORTIONED PURSUANT TO ARTICLE VIII
(5)(E)(II).

4. RUMPF STATED THAT THE BELGIAN PROPOSAL WOULD
AMOUNT TO A DEVIATION FROM THE NATO SOFA, PARTICULARLY
AS THE BELGIANS WERE PROPOSING USE OF THE WORD ACTION
INSTEAD OF RESPONSIBILITY. CASSIERS STATED THAT THE
BELGIANS WERE PREPARED TO BE JOINTLY RESPONSIBLE WITH
THE US AND FRG WHILE CONTACT WITH THE WEAPON WAS
MAINTAINED BUT THEY COULD NOT BE RESPONSIBLE
IF THE WEAPON EXPLODED OR DAMAGES OR INJURIES WERE
INFILCTED AFTER THE BELGIAN FORCES HAD LOST CONTACT
WITH IT. BELGIAN (UK AND NETHERLAND) RESPONSIBILITY

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SHOULD BE LIMITED TO INJURIES OR DAMAGES RESULTING FROM HOT PURSUIT EFFORTS TO RECOVER THE WEAPON. RUMPF RESPONDED THAT IN HIS GOVERNMENT'S VIEW THE THIRD STATES WOULD ALSO BE INVOLVED IN THE RECOVERY EFFORTS EVEN IF THE WEAPONS HAD GOTTEN AWAY FROM THEM. CASSIERS STATED CATEGORICALLY THAT HIS AUTHORITIES COULD BECOME A PARTY TO THE MOU'S ONLY IF THE DUTY OF HOT PURSUIT RESULTED IN RESPONSIBILITY FOR DAMAGES.

5. PFUND EXPRESSED CONCERN THAT THE BELGIAN PROPOSAL COULD RESULT IN, OR BE SEEN TO CREATE, A DISINCENTIVE FOR THE THIRD STATE FORCES EFFECTIVELY TO ENGAGE IN HOT PURSUIT IN VIEW OF THE THEORETICALLY HIGH DAMAGES THAT COULD RESULT. THE BELGIAN AND THE DUTCH REPS RESPONDED THAT THEY BELIEVED THE DISINCENTIVE ARGUMENT WAS MET BY THE OBLIGATIONS UNDERTAKEN IN SUB-SECTION 1 OF SECTION IV TO "USE ALL APPROPRIATE MEANS PROMPTLY TO RESTORE POSSESSION OF THE NUCLEAR WEAPON TO THE CUSTODIAL POWER, OR, IF THIS IS NOT POSSIBLE AND THE SITUATION DEMANDS, DESTROY IT."

6. THE BELGIAN REP STATED THAT IF A WEAPON IS LOST IT WOULD BE BECAUSE SOMEONE WITHIN THE FRG ESCAPED THE PREVENTIVE EFFORTS OF THE FRG AND BECAUSE THE US REQUIREMENTS AS TO WHAT SHOULD BE DONE TO PREVENT THE WEAPON FROM FALLING INTO UNAUTHORIZED HANDS HAD PROVEN INADEQUATE. MAKING THE PROVISIONS OF ARTICLE VIII (5)(E)(II) APPLY ALSO TO LOSS OF THE WEAPON WOULD CREATE LEGAL PROBLEMS; IT WAS THEREFORE BETTER TO LIMIT LIABILITY APPORTIONMENT EXCLUSIVELY TO HOT PURSUIT.

7. EATON SUGGESTED THAT IF THE LIABILITY PROVISION OF
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SECTION IV WERE DESIGNED NOT TO TOUCH ON CIRCUMSTANCES OTHER THAN THOSE REFERRED TO IN SUB-SECTION 1 OF THAT SECTION IT WOULD BE BEST EXPRESSLY SO TO PROVIDE. HE ALSO BELIEVED THAT THE WORDS "IN PARTICULAR" DID NOT ESTABLISH THE DESIRED REBUTTABLE PRESUMPTION AS CLEARLY AS THAT PRESUMPTION WOULD BE CREATED BY USE, FOR EXAMPLE, OF THE WORDS "IT IS PRESUMED" IN A FORMULA-TION TO ESTABLISH THAT PRESUMPTION. EATON ALSO REFERRED TO THE UK PROPOSAL AT THE PREVIOUS MEETING

THAT PERHAPS IT WOULD BE BEST NOT TO DELAY THE CONCLUSION OF THE TRILATERAL MOU'S ANY LONGER BY REASON OF THE CIVIL LIABILITY QUESTION. HE REPEATED THE UK PROPOSAL THAT THE LIABILITY QUESTION BE REFERRED TO A SUB-GROUP OR COMMITTEE. THE DUTCH AND US REPS RESPONDED NEGATIVELY TO THIS PROPOSAL WHICH, THEY STATED, COULD RESULT IN A VERY DRAWN OUT DISCUSSION OF THE LIABILITY ASPECTS IN A COMMITTEE NOT SEEKING TO RESOLVE THAT QUESTION IN THE OVERALL CONTEXT, BOTH POLITICAL AND LEGAL, OF THE NEED FOR THE MOU'S AND SUBSEQUENT PLANNING. BELGIAN REP SEEGERS ONCE MORE STRONGLY MADE THE POINT THAT THE PRIMARY RESPONSIBILITY FOR THE SECURITY OF THE SENDING STATE FORCES AND THEIR EQUIPMENT AND MUNITIONS IN THE FRG IS THAT OF THE FRG, AND THAT THIS RESPONSIBILITY SHOULD BE THE POINT OF DEPARTURE FOR EXAMINATION OF POSSIBLE RESPONSIBILITY OF OTHER STATES AS WELL.

8. DEMING PROPOSED THE FOLLOWING WORDING FOR SUB-SECTION 4: BEGIN TEXT IT IS RECOGNIZED THAT RESPONSIBILITY FOR DAMAGE ARISING OUT OF RECOVERY OPERATIONS IN FURTHERANCE OF PARAGRAPH 1 OF THIS SECTION IS TO BE APPORTIONED IN ACCORDANCE WITH THE NATO STATUS OF FORCES AGREEMENT, IN PARTICULAR ARTICLE VIII(5)(E)(II). END TEXT THE DUTCH, GERMAN AND US REPS INDICATED THAT THEY UNDERSTOOD THE TERM "RECOVERY OPERATIONS" IN THE WIDER SENSE, I.E., TO INCLUDE RECOVERY EFFORTS EVEN

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ONCE THE FORCES ENGAGED IN HOT PURSUIT HAD LOST TRACK

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INFO OCT-01 ISO-00 SSO-00 /026 W
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P R 231714Z MAY 78
FM AMEMBASSY BONN

TO SECSTATE WASHDC PRIORITY 8788
INFO AMEMBASSY BRUSSELS
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AMEMBASSY THE HAGUE
SECDEF WASHDC
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EXDIS

MILITARY ADDRESSEES HANDLE AS SPECAT EXCLUSIVE

OF THE WEAPON AND SUBSEQUENT RECOVERY EFFORTS BECAME
LARGELY OR ENTIRELY AN FRG OPERATION.

9. CASSIERS STATED THAT HE WAS NOT PREPARED TO ACCEPT
OUT OF HAND THE WIDE UNDERSTANDING OF THE TERM
"RECOVERY OPERATIONS." SUCH A BROAD TERM WAS NOT WHAT
HE HAD IN MIND BY THE TERM "ACTION" IN THE BELGIAN
PROPOSAL. SHOULD THIS FORMULATION BE ADOPTED, IT WAS
POSSIBLE THAT, DESPITE HIS INSTRUCTIONS TO SEEK DELE-
TION OF THE TERM OF THE WORDS "IN PARTICULAR", THE
BELGIAN GOVERNMENT WOULD WISH TO MAINTAIN THOSE
TWO WORDS IN ORDER TO PRESERVE FLEXIBILITY.

10. IT WAS RECOGNIZED BY ALL THAT MAINTAINING THE
WORDS "IN PARTICULAR" WOULD GIVE THE BELGIAN
GOVERNMENT THE OPTION, IF ITS FORCES WERE
NOT INVOLVED IN THE RECOVERY OPERATIONS WHICH RESULTED
IN INJURY OR DAMAGE, TO SEEK

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TO REJECT THE PRESUMPTION THAT IT WOULD SHARE A ONE-
THIRD RESPONSIBILITY FOR THOSE INJURIES
AND/OR DAMAGES WITH THE US AND FRG. ON THE BASIS OF
THIS UNDERSTANDING THE BASIC IDEA BEHIND THE DUTCH
PROPOSAL QUOTED ABOVE WAS ACCEPTED.

11. EATON THEN RAISED THE POINT REFERRED TO BY THIS
EMBASSY IN PARAGRAPH 5 OF REFTEL B. HE SUGGESTED
REMOVING FROM THE DUTCH FORMULATION QUOTED ABOVE THE
WORDS "RESPONSIBILITY FOR" AND THIS PROPOSAL WAS
ACCEPTED AFTER SOME INITIAL PERCEIVED DIFFICULTIES IN
TRANSLATING "DAMAGE...IS TO BE APPORTIONED" INTO
FRENCH.

12. THE US REP SOUGHT TO HAVE THE TERM DAMAGE CHANGED
TO DAMAGES IN ACCORDANCE WITH PARAGRAPH 2 OF THE
INSTRUCTIONS IN REFTEL A. HOWEVER, THE GENERAL CONSEN-

SUS IN THE CONTEXT WAS THAT USE OF THE PLURAL FORM WOULD IMPLY THAT THE TERM "DAMAGES" WAS BEING USED IN THE SENSE OF ADJUDICATED DAMAGES RATHER THAN DAMAGE (INCLUDING INJURIES) INFILCTED OR INCURRED. IN VIEW OF FINAL AGREEMENT OTHERWISE ON THE TEXT OF THIS DIFFICULT PROVISION, THE US REP CONSIDERED IT BEST NOT TO PURSUE THIS RELATIVELY MINOR POINT FURTHER.

13. ALL PRESENT AGREED TO REFER THE TEXT OF THE MOU CONTAINING THE DUTCH PROPOSAL, AS AMENDED, TO GOVERNMENTS WITH A RECOMMENDATION FOR FINAL APPROVAL. IT WAS AGREED THAT WHILE FINAL NON-SUBSTANTIVE LANGUAGE CHANGES WOULD BE DISCUSSED BY THE US AND FRG WITH THE RESPECTIVE THIRD STATE ON A BILATERAL BASIS, THE FINAL TEXTS WOULD BE SIGNED AT A COMMON SIGNING CEREMONY. ALL AGREED THAT AN EFFORT WOULD BE MADE TO

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PERMIT SIGNING OF THE MOU'S BEFORE THE SUMMER VACATION, WHICH BEGINS IN THIS PART OF THE FRG END OF JUNE.

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ACTION SS-25

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TO SECSTATE WASHDC PRIORITY 8789
INFO AMEMBASSY BRUSSELS
AMEMBASSY LONDON
AMEMBASSY THE HAGUE
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MILITARY ADDRESSEES HANDLE AS SPECAT EXCLUSIVE

14. ACTION REQUESTED: EMBASSY REQUESTS WASHINGTON APPROVAL ASAP OF FOLLOWING CIVIL LIABILITY PROVISION OF SECTION IV OF MOU'S, AND THE ENTIRE SUBSTANTIVE TEXT OF THE MOU'S:

BEGIN TEXT

IT IS RECOGNIZED THAT DAMAGE ARISING OUT OF RECOVERY OPERATIONS IN FURTHERANCE OF PARAGRAPH 1 OF THIS SECTION IS TO BE APPORTIONED IN ACCORDANCE WITH THE NATO STATUS OF FORCES AGREEMENT, IN PARTICULAR ARTICLE VIII(5)(E)(II).

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END TEXT

WE WOULD APPRECIATE CONFIRMATION THAT WITH APPROVAL TO THIS TEXT THE EMBASSY IS AUTHORIZED TO CONVEY FINAL USG APPROVAL OF THE WORDING OF THE THREE TRILATERAL MOU'S, THE ONLY FURTHER CHANGES BEING IN THE NAMES GIVEN TO THE RESPECTIVE THIRD STATE FORCES AND OFFICERS AND THE AGENCIES OF THAT STATE. EMBASSY WOULD APPRECIATE ANY SUGGESTIONS CONCERNING THE DESIRED FORM OF THE MOU'S. TO FACILITATE WASHINGTON REVIEW OF THE TEXT, WE ARE POUCHING ONE COPY OF THE TEXT TO L/PM - MR. MATHESON AND REQUEST THAT COPIES OF THAT TEXT BE CONVEYED BY L/PM DIRECTLY TO THE OTHER USG AGENCIES INVOLVED.

STOESSEL

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